

1
2
3
4
5
6
7
8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF OREGON

11 SARA D. MORELL,)
12)
13 Plaintiff,) No. CV-04-6357-HU
14 v.)
15)
16 JO ANNE B. BARNHART,)
Commissioner of Social) FINDINGS & RECOMMENDATION
17 Security,)
18)
19 Defendant.)
20 _____)

21 Kathryn Tassinari
22 Drew L. Johnson, P.C.
23 1700 Valley River Drive, First Floor
24 Eugene, Oregon 97401

25 Attorney for Plaintiff

26 Karin J. Immergut
27 UNITED STATES ATTORNEY
28 District of Oregon
Neil J. Evans
ASSISTANT UNITED STATES ATTORNEY
1000 S.W. Third Avenue, Suite 600
Portland, Oregon 97204-2902

29 Leisa A. Wolf
30 SPECIAL ASSISTANT UNITED STATES ATTORNEY
31 Social Security Administration
32 701 5th Avenue, Suite 2900 M/S 901
33 Seattle, Washington 98104-7075

34 Attorneys for Defendant

35 1 - FINDINGS & RECOMMENDATION

1 HUBEL, Magistrate Judge:

2 Plaintiff Sara D. Morell brings this action for judicial
3 review of the Commissioner's decision to deny supplemental security
4 income (SSI) both as a child and as an adult. This Court has
5 jurisdiction under 42 U.S.C. §§ 405(g) (incorporated by 42 U.S.C.
6 § 1383(c)(3)). I recommend that the Commissioner's decision be
7 affirmed.

8 PROCEDURAL BACKGROUND

9 On May 26, 2001, plaintiff's father Victor Morell applied for
10 SSI benefits on plaintiff's behalf, alleging an onset of disability
11 as of November 1, 1984, plaintiff's date of birth. Tr. 85-87. The
12 application was denied initially and on reconsideration. Tr. 70-
13 79. Plaintiff requested a hearing. Tr. 80.

14 On November 1, 2002, plaintiff turned eighteen and required a
15 disability evaluation based on criteria for adult claimants. She
16 was given a protective filing date on an application for adult SSI
17 payments. Tr. 33.

18 A joint hearing on plaintiff's child and adult claims was held
19 on October 15, 2003, before an Administrative Law Judge (ALJ). Tr.
20 534-75. Plaintiff was represented by counsel. Id. On December
21 24, 2003, the ALJ found plaintiff not disabled under the standards
22 for a child's claim and an adult claim. Tr. 17-42. The Appeals
23 Council denied plaintiff's request for review of the ALJ's
24 decision. Tr. 7-15.

25 FACTUAL BACKGROUND

26 Plaintiff alleges disability beginning at birth, based on
27 chronic fatigue syndrome, Epstein-Barr virus, carpal tunnel
28 syndrome, depression, headaches, bouts of infectious mononucleosis,

1 fibromyalgia, post-traumatic stress disorder, dyslexia, myofascial
2 pain syndrome, and a large number of symptoms including
3 frustration, anxiety, forgetfulness, mood swings, handwriting
4 difficulties, post-exertional malaise, jaw clenching, inability to
5 run, dance, swim, drive a car, or play sports, sleep anomaly (non-
6 restorative sleep), and insomnia. Tr. 21. At the time of the
7 October 15, 2003 hearing, plaintiff was almost nineteen years old.
8 Tr. 85.

9 After dropping out of high school in tenth grade, plaintiff
10 obtained a general equivalency diploma (GED) at age sixteen. Tr.
11 544. Before she dropped out, she had a Section 504 Plan to allow
12 her to attend for a shorter school day. Tr. 145, 184. She has
13 worked briefly for a cleaning service. Tr. 546.

14 I. Medical Evidence

15 The medical evidence begins with plaintiff's admission to a
16 psychiatric hospital at age eight, for depression. Tr. 434-54.
17 This event coincided with her parents' divorce. Tr. 447. The
18 record demonstrates that plaintiff has continued to suffer from
19 depression, with, as noted below, the ALJ concluding that it is one
20 of plaintiff's severe impairments. Tr. 22, 29, 35, 41 (ALJ
21 decisions); 339 (Dr. Mary Lou Belozzer's March 1999 chart note
22 indicating possible underlying depression and personality
23 disorder); 344 (May 1999 chart note from Dr. Claudia Goulston
24 stating that depression may be playing a role in plaintiff's
25 fatigue); 530 (December 2000 chart note from Dr. William Barish
26 stating that in his opinion, depression is plaintiff's leading
27 cause for her fatigue); 489 (Dr. Albert Turbessi's September 1996
28 chart note opining that he strongly suspects pure psychiatric

1 diagnosis).

2 Over the years, plaintiff has seen numerous physicians, both
3 in Pennsylvania where her father lives, and in Oregon, where her
4 mother lives. The extensive records show treatment by primary care
5 practitioners and specialists on occasion. Not all of the records
6 are relevant to the issues in this litigation. Thus, discussed
7 here is only the medical evidence pertaining to the alleged errors
8 by the ALJ raised by plaintiff in this appeal.

9 Plaintiff treated with Dr. Mary Lou Belozar, M.D., at
10 Samaritan Health Physicians in Lebanon, Oregon, from February 12,
11 1999, to April 6, 1999. Tr. 337-43. Dr. Belozar questioned
12 whether plaintiff had chronic fatigue syndrome (CFS) and suspected
13 that plaintiff's fatigue was secondary to depression and
14 personality disorder. Tr. 338. She ultimately suggested that it
15 would be more appropriate for plaintiff and her mother to seek
16 health care at another facility after plaintiff's mother hung up
17 the phone during a conversation with Dr. Belozar when Dr. Belozar
18 opined that plaintiff could go to school. Id.

19 Plaintiff then sought treatment from Dr. Claudia Goulston,
20 M.D., at PeaceHealth Medical Group in Eugene, Oregon, from April 9,
21 1999, to May 21, 1999. Tr. 344-49. Dr. Goulston noted that based
22 on plaintiff's report, plaintiff had a "history of chronic fatigue
23 type syndrome." Tr. 344. Dr. Goulston noted that plaintiff had
24 some positive tender points on her chest wall, but had some false
25 positives in the supraclavicular areas and was not tender over her
26 arms. Id. In her assessment, she suggested that plaintiff might
27 have multiple reasons for her fatigue and that depression might be
28 playing a role. Id.

1 From May 1999 to December 2000, plaintiff treated with Dr.
2 William G. Barish, M.D., in Lebanon, Oregon. Tr. 248-61. Her
3 first visit was with a physician's assistant in Dr. Barish's
4 practice who noted that according to her mother, plaintiff had
5 cytomegalovirus (CMV) and that she is tired all the time. Tr. 254.
6 Her immediate concern on that date, however, was a sore throat and
7 ear ache. Id.

8 The record shows that she was not seen again until July 2000,
9 this time by Dr. Barish himself. Tr. 253. At this time, plaintiff
10 reported to Dr. Barish that she had seen an infectious disease
11 specialist in Eugene who had diagnosed her with CMV and that it
12 caused her chronic fatigue. Id. Dr. Barish indicated that the
13 chronic headaches she complained of were of uncertain origin and
14 could be some type of frontal sinus problem. Id. He was unclear
15 of how to proceed because plaintiff was leaving in two days to
16 return to the east coast. Id. He gave her samples of a
17 prescription nasal spray with instructions to use two sprays in
18 each nostril once per day for one month, and then to report to a
19 physician on the east coast. Id.

20 Plaintiff returned to see Dr. Barish in November and December
21 2000. Tr. 250-51. She did not mention fatigue until the December
22 2000 appointment. Tr. 250. She reported having been diagnosed by
23 physicians in the past in Pennsylvania with chronic Epstein-Barr
24 virus (EBV) and possibly chronic CMV. Id. Dr. Barish noted that
25 she suffered from chronic fatigue of uncertain etiology but that he
26 favored depression as the leading cause. Id. He also opined that
27 her chronic headaches were likely muscle contraction, or possibly
28 rebound headaches or caffeine withdrawal headaches. Id.

1 As noted, although plaintiff saw the physician's assistant in
2 Dr. Barish's office in May 1999, she did not return to that clinic
3 to see Dr. Barish himself until July 2000. It appears that at
4 least for part of this time, she was in Pennsylvania because in
5 February 2000, she was assessed by Dr. Michael D. Green, M.D.,
6 M.P.H., an infectious disease specialist there. Tr. 368-73. Dr.
7 Green determined that plaintiff did not meet all of the diagnostic
8 criteria established by the Centers for Disease Control for CFS.
9 Tr. 372. He suggested that plaintiff receive a psychiatric
10 evaluation before any diagnosis of CFS could be confirmed. Tr.
11 373. He opined that there could be psychological explanations for
12 her fatigue. Id.

13 Plaintiff treated with Volney Willett, M.D., and Robert Wirth,
14 M.D., at the Corvallis Clinic from February 13, 2001, to February
15 7, 2002. Tr. 307-18, 374, 505-26. At the initial visit, Dr.
16 Wirth, based on plaintiff's and her mother's reports of her past
17 medical history, assessed plaintiff as having CFS, "plus or minus
18 chronic Epstein-Barr," and chronic headaches. Tr. 314-15. He
19 planned to perform a number of tests, take a chest x-ray, and
20 change her medications. Tr. 315.

21 In a follow-up appointment two months later in April 2001, Dr.
22 Wirth noted that plaintiff benefitted from the new medications, and
23 although she was sleeping approximately twelve hours at a stretch,
24 this was down from fifteen to sixteen hours, and plaintiff reported
25 more energy during the day and an ability to get things done. Tr.
26 311. He noted that her hepatitis serologies were negative, and
27 that her Epstein-Barr VCA antibody was 1 to 640, suggesting a past
28 exposure to EBV, but no current infection. Id., 316-17, 523.

1 The next chart note from treatment at the Corvallis Clinic is
2 dated January 24, 2002, and is from Dr. Willett. Tr. 307-08. She
3 makes no reference to plaintiff having been seen by Dr. Wirth, and
4 instead remarks that plaintiff is there to establish care. Id.
5 Dr. Willett remarked that plaintiff appeared with multiple
6 complaints, including low back pain, fatigue, and weakness, and
7 that a Dr. Lila McQueen, Ph.D., had diagnosed plaintiff with
8 depression, post-traumatic stress disorder, and panic disorder.
9 Tr. 308. Dr. Willett noted that "[t]he family is looking into
10 getting disability for this patient." Id. In her assessment, Dr.
11 Willett remarked on plaintiff's and her family's "long history of
12 medical and psychological issues[.]" Tr. 309. She noted, based on
13 plaintiff's and her mother's report of plaintiff's history,
14 plaintiff's CFS and EBV, and remarked on her February 2001 EBV-VCA
15 laboratory results. Id. She also noted that in response to the
16 family's expressed curiosity about fibromyalgia, she would have
17 plaintiff see Dr. Ladd. Id.

18 Plaintiff saw Dr. John Ladd, M.D., on February 6, 2002. He
19 remarked that plaintiff and her mother "indicate that they would
20 like to have a definite diagnostic label so they could have her
21 labeled as having a disability." Tr. 324. Dr. Ladd determined
22 that she did not meet the criteria for fibromyalgia and he wondered
23 how much of her symptomatology was related to psychological
24 factors. Tr. 325. He noted that it was in plaintiff's best
25 interest to be encouraged to increase her activity rather than
26 limit it. Id.

27 Plaintiff returned to see Dr. Willett the next day. During
28 that visit, Dr. Willett noted that plaintiff was "well-appearing,"

1 and in "no acute distress[.]" Tr. 374. She also remarked that
2 "[t]he patient and her mother are looking for a diagnosis of
3 fibromyalgia. . . . The patient and her mother do not seem to be
4 happy with not being diagnosed with fibromyalgia and are asking for
5 a second opinion. . . . The patient is trying for a diagnosis of
6 fibromyalgia like her mother and aunt. They are both on
7 disability. They are working with social security to get
8 disability for these diagnoses." Id. Dr. Willett referred
9 plaintiff to a Dr. Hudson for further evaluation. Id. Dr. Willett
10 also recommended plaintiff to the fibromyalgia clinic at Oregon
11 Health & Sciences University, but plaintiff did not want to go that
12 far. Id.

13 Before seeing Dr. Willett in January 2002, plaintiff was
14 examined by Dr. David Morrell, M.D., on December 1, 2001. Tr. 280-
15 83. He noted her chief complaints as fatigue and depression. Tr.
16 280. She also complained of headaches. Id. She reported having
17 CFS and EBV, and was currently taking Zoloft and Trazodone. Id.

18 Dr. Morrell noted that plaintiff appeared healthy and non-
19 tired. Tr. 281. On physical examination, he noted that she had
20 upper cervical chain lymphadenopathy which was mildly tender and
21 with the lymph nodes measuring up to approximately 2.0 centimeters.
22 Id. Under his "General Findings," he indicated that she had mild
23 tenderness in the paravertebral regions of the lower cervical spine
24 and upper lumbar spine with the fibromyalgia examination 4/18. Tr.
25 282. He concluded that she suffered from EBV syndrome because of
26 her mildly tender residual upper cervical chain lymphadenopathy.
27 Tr. 283. But, he explained, she appeared well and he expected a
28 complete and fully recovery from the EBV infection. Id. She did

1 not meet the criteria for fibromyalgia. Id.

2 During the time that plaintiff was treating at the Corvallis
3 Clinic, she was seeing Dr. Lila McQueen, Ph.D., a clinical
4 psychologist. Tr. 284-99, 386-95, 429-30. Plaintiff saw Dr.
5 McQueen for just over one month, from October 23, 2001, until
6 November 27, 2001. Id. The record also shows an attempt at a
7 visit in July 2002. Tr. 386-87.

8 Dr. McQueen's intake note, dated October 23, 2001, recites
9 plaintiff's presenting problems as identity conflict, low energy,
10 poor achievement, stress, depression, interpersonal conflict,
11 oppositional behavior, poor self-esteem, anxiety, labile mood,
12 memory impairment, and sleep disturbance. Tr. 298. At the time,
13 plaintiff was taking Zoloft and Trazodone. Id. Her mental status
14 was anxious and depressed. Id. Plaintiff reported medical
15 conditions of EBV syndrome, CFS, recurrent mononucleosis, chronic
16 pain, history of bladder and kidney infections, and recurrent colds
17 and flu. Id. Dr. McQueen diagnosed plaintiff with major
18 depression, paid disorder, and post-traumatic stress disorder. Tr.
19 299. Her treatment plan was for individual and family therapy.
20 Id.

21 Plaintiff saw Dr. McQueen for therapy on November 6, 2001,
22 November 15, 2001, and November 27, 2001. Tr. 291-97. Dr.
23 McQueen's diagnoses remained the same throughout these sessions,
24 although her notes reflect an exacerbation of symptoms on two
25 occasions (November 6, 2001, November 27, 2001), and slight
26 improvement on another (November 15, 2001). Tr. 291, 294, 296).

27 On November 19, 2001, Dr. McQueen wrote a letter to Linn-
28 Benton Community College in support of plaintiff's request for an

1 extension of the deadline for reimbursement of fees. Tr. 293. Dr.
2 McQueen stated that plaintiff had major depression, post-traumatic
3 stress disorder, a learning disability in math, dyslexia, chronic
4 pain, and CFS. Id. According to Dr. McQueen, these disorders made
5 it difficult for plaintiff to concentrate, get and stay organized,
6 remember details, including appointments and deadlines, and could
7 impair her ability to make decisions. Id. She further stated that
8 the pain and fatigue caused plaintiff to have decreased or no
9 participation in regularly scheduled activities, disrupting her
10 ability to lead a normal lifestyle. Id.

11 On November 29, 2001, Dr. McQueen issued an attention deficit
12 disorder assessment report, indicating that plaintiff was referred
13 to Dr. McQueen for assessment and evaluation of this particular
14 disorder. Tr. 286-90. Testing revealed that plaintiff did not
15 meet the criteria for attention deficit disorder. Tr. 290.

16 On December 11, 2001, Dr. McQueen wrote to Disability
17 Determination Services regarding plaintiff, rendering the same
18 opinions expressed in her November 19, 2001 letter to the community
19 college. Tr. 285. Thus, she stated that plaintiff had major
20 depression, post-traumatic stress disorder, a learning disability
21 in math, dyslexia, chronic pain, and CFS. Id. She further stated
22 that plaintiff had difficulties in concentration, getting and
23 staying organized, and remembering details, including appointments
24 and deadlines, and that these impairments would likely be lifelong.
25 Id.

26 Dr. McQueen did not see plaintiff again after her November 27,
27 2001 appointment, until July 30, 2002. Tr. 386-87. At that time,
28 plaintiff's mother drove plaintiff to Dr. McQueen's office, after

1 plaintiff's mother had called Dr. McQueen several times, because
2 plaintiff's mother was concerned about plaintiff's suicide risk in
3 light of plaintiff's two dogs having been killed and plaintiff
4 stopping certain medication against medical advice. Tr. 386.
5 Plaintiff, however, refused to see Dr. McQueen, walking away from
6 the van and refusing to come into the office. Id. When Dr.
7 McQueen came outside, plaintiff was uncooperative, seemed resentful
8 and oppositional, and walked away when Dr. McQueen asked her about
9 suicidal ideation. Id. Upon plaintiff's mother's request, Dr.
10 McQueen suggested two hospitals where plaintiff's mother could take
11 plaintiff, after which plaintiff and her mother left. Id.

12 Following this, the only other report from Dr. McQueen in this
13 administrative record is an August 4, 2003 psychological report in
14 which Dr. McQueen opines that plaintiff has functional limitations
15 of stamina, impulse control, concentrating/distractability,
16 reasoning/memory, coping skills, interpreting information, and
17 interpersonal skills. Tr. 429. Dr. McQueen recited a list of
18 plaintiff's symptoms and the testing Dr. McQueen performed,
19 presumably in October and November 2001. Id. She recited
20 plaintiff's diagnoses from November 2001 and then opined that full-
21 time employment would be difficult or impossible for plaintiff and
22 that she might not be able to perform part-time work. Tr. 430.

23 Following her treatment with Dr. Willett in February 2002,
24 plaintiff then began seeing nurse practitioner Sandra Young at
25 Corvallis Internal Medicine, in late February 2002, and continued
26 to treat with her until June 24, 2003. Tr. 375-85, 401-12. It
27 appears that at the first visit, plaintiff was actually seen by Dr.
28 James Gallant, M.D., and thereafter was followed by Young. Id.

1 At the February 27, 2002 visit with Dr. Gallant, plaintiff's
2 mother reported that she herself had fibromyalgia and chronic
3 fatigue, and that plaintiff had both diseases as well. Tr. 384.
4 After a physical exam which showed multiple trigger points over the
5 head, neck, back, arms, and legs, which Dr. Gallant described as
6 fairly consistent with fibromyalgia, he assessed plaintiff as
7 having "[s]ymptom complex, consistent with myofascial pain,
8 fibromyalgia, chronic fatigue and depression." Id. He noted that
9 plaintiff reported running and exercising daily, and he encouraged
10 her in "lifestyle, diet and exercise" by encouraging her to stay
11 physically active and "mentally engage." Id. He also changed some
12 of her medications. Id.

13 Following that initial visit, plaintiff began seeing Young.
14 Tr. 375-85, 401-12. Young's treatment records show that
15 medications were working well and although plaintiff appeared quite
16 fatigued at her March 19, 2002 appointment, plaintiff continued
17 daily exercise, walking, and a home exercise routine. Tr. 383. On
18 May 7, 2002, Young reported that plaintiff was "doing well," had
19 moved to Beaverton and was cleaning houses, although plaintiff
20 reported that this activity wore her out. Tr. 382. Her medication
21 was working well for her, although she reported still sleeping
22 quite a bit. Id. On August 23, 2002, Young noted that the
23 medication was helping the CFS. Tr. 381. In November 2002, Young
24 reported that plaintiff was "doing pretty well," and that her CFS
25 and chronic pain were stable. Tr. 378.

26 Plaintiff did not see Young again until March 18, 2003, when
27 she complained of severe neck pain. Tr. 376. Young noted
28 plaintiff's struggle with trying to obtain disability and indicated

1 that plaintiff was unable to work. Id. Young saw plaintiff again
2 on April 2, 2003, and remarked that plaintiff was in "mild physical
3 distress." Id.

4 In an April 24, 2003 letter to plaintiff's attorney, Young
5 opined that she had seen plaintiff once or twice per month since
6 February 27, 2002, and that plaintiff's symptoms had worsened over
7 that time. Tr. 375. She indicated that when plaintiff came to
8 Young's office, she appears quite fatigued, groggy, and slow to
9 respond to questions. Id. She stated that plaintiff was unable to
10 perform routine activities of daily living and required help from
11 friends with daily chores. Id. Young reported that plaintiff's
12 testing for lupus and rheumatoid arthritis was normal, as was her
13 routine lab work and an x-ray of her cervical spine. Id. Young
14 reported that plaintiff had been fairly compliant in her plan of
15 care, yet continued to deteriorate, and that in her professional
16 opinion, plaintiff would be unable to hold down any sort of
17 employment related to pain and severe fatigue. Id.

18 II. Plaintiff's Testimony

19 Plaintiff testified at the hearing that she was living with a
20 friend, having lost her public assistance housing over a conflict
21 with her landlord regarding her dog. Tr. 539-40. She relied on
22 her mother and stepfather for financial support. Tr. 540.

23 At the time of the hearing, she was taking the following
24 medications: Lexapro for depression, Naproxen as an anti-
25 inflammatory, Acyclovir for herpes, Zoloft for depression, Provigal
26
27
28

1 for depression¹, Nexium for ulcer symptoms, hydrocodone as needed
2 for pain, and birth control pills. Tr. 164, 540-41. She explained
3 that she obtained the hydrocodone from a hospital for a specific
4 condition, but she does not take it regularly. Tr. 542.

5 The friend plaintiff was living with and plaintiff's boyfriend
6 do most of the cleaning, but sometimes plaintiff does laundry to
7 help out if she can. Tr. 542. Plaintiff stated that she cannot do
8 household errands or grocery shopping because she ends up in pain
9 in less than fifteen or twenty minutes. Tr. 548. On a good day,
10 she is able to do some laundry or make her bed, but most of the
11 time, such chores do not get done. Tr. 549. She cannot do the
12 dishes. Tr. 552.

13 She experiences pain all over - from head to toe, including
14 headaches and nausea. Tr. 548. She is in pain constantly, and it
15 worsens with activities. Tr. 548-49. She experiences constant
16 fatigue. Tr. 550-51.

17 She sleeps approximately ten to thirteen hours per night. Tr.
18 549. After her extended sleep, on an average day she will take a
19 shower, which takes an hour, and then sometimes read or watch
20 television.² Tr. 550. However, some days she is too sick to get
21

22 ¹ Although the medication chart plaintiff filled out states
23 that Provigal was for depression, Tr. 164, during the hearing she
24 indicated that it is a narcolepsy drug which she took in order to
25 regain energy. Tr. 551. She further testified that it made her
26 sick, shaky, and caused her heart to pound. Tr. 551. Although
she did not expressly testify that she no longer took the drug, I
presume she ceased taking it based on her testimony.

27 ² How much plaintiff reads is questionable based on her
28 later testimony that she has difficulty reading and it makes her
sick. Tr. 553, 555.

1 out of bed or to shower. Tr. 553. She has a hard time
2 concentrating and gets headaches several times per week. Tr. 553.

3 She does not go out, but instead visits with friends who come
4 over while she sits or rests in bed. Tr. 552. Approximately six
5 weeks before the hearing, plaintiff obtained her driving permit,
6 although she stated that she had only been able to drive short
7 distances and only a handful of times. Tr. 556.

8 Since getting her GED, plaintiff tried to attend two community
9 college classes, but ended up taking only one. Tr. 545. It met
10 two hours, twice each week, in the evening. Id. She completed the
11 class, obtaining an A, but she did not enroll for further classes
12 after completing the one, because it was too hard to keep up even
13 with the one class. Tr. 558. She explained that she missed a lot
14 of the classes and got an A in the course because the teacher was
15 "really understanding" and allowed her to do a lot of work at home.
16 Id.

17 As far as work experience, she attempted to work at a cleaning
18 service with a friend twice per week, but she could not keep up.
19 Tr. 546. She stated that she would have to sit down and stop and
20 then would go to sleep. Id. She became fatigued. Id.

21 Plaintiff testified that over the last few years, her pain and
22 fatigue had worsened. Tr. 556-57. She stated that she is
23 frequently ill because of EBV, and that even sitting or standing
24 for a long time causes her pain. Tr. 551-52. Even with a job that
25 was not physically demanding, she could do it only for an hour, if
26 she pushed herself "to the limits." Tr. 553.

27 III. Lay Witness Testimony

28 Plaintiff's mother Linda Tuma testified at the hearing. She

1 sees her daughter almost daily. Tr. 560. Plaintiff lived with her
2 mother and stepfather up to approximately eighteen months before
3 the hearing. Id. Tuma takes plaintiff to doctor and dentist
4 appointments and also takes her shopping. Tr. 561. She does
5 errands for plaintiff, including her grocery shopping, and helps
6 her with things like laundry. Id.

7 She described plaintiff as always being sick, always having
8 been sick, and always having been fatigued. Id. According to
9 Tuma, plaintiff has been chronically fatigued, sometimes sleeping
10 for days on end, since she was five or six years old. Id. She
11 noted plaintiff's chronic flu-like symptoms, colds, chronic
12 infections, chronic strep throat, and bouts of depression. Tr.
13 562. She described plaintiff's average day as one in which
14 plaintiff does not get up until 1:00 or 2:00 in the afternoon, and
15 then "she just kind of sits around her house." Id. She rarely
16 goes out with her boyfriend. Id. Plaintiff will occasionally go
17 shopping with Tuma if Tuma has taken her to an appointment. Tr.
18 565. For clothes shopping, she does not try clothes on in a store,
19 but takes them home with her instead because she is too tired to do
20 it in a store. Id.

21 Although Tuma offered to pay for plaintiff to take classes at
22 the community college, plaintiff does not feel well enough to do
23 it. Id. Tuma opined that plaintiff's depression had gotten worse
24 in the last two or three years. Tr. 566.

25 IV. Vocational Expert Testimony

26 The ALJ posed the following hypothetical to vocational expert
27 (VE) Kay Hartgrave: an individual who is eighteen years old with
28 a GED and no past relevant work, who has no exertional limitations,

1 but who should not have close interaction with the general public
2 and no jobs that require extensive math or reading. Tr. 573. In
3 response, the VE testified that such a person could work as an
4 animal shelter helper, a sorter of soft goods, a distribution
5 worker for printed products, and an optical goods worker. Tr. 573-
6 74.

7 On cross-examination, the VE was asked to consider a
8 hypothetical person who is unable to work more than one or two
9 hours in a day. Tr. 574. The VE testified that those limitations
10 would preclude full-time competitive work.

11 THE ALJ'S DECISION

12 Because, as noted below, the standards for a child's claim are
13 different than those for an adult claim, the ALJ issued two
14 separate decisions in the case. However, the reasoning in support
15 of the ALJ's ultimate conclusion in each decision, is essentially
16 the same.

17 I. Adult Claim

18 The ALJ found that plaintiff has not engaged in any
19 substantial gainful activity since her alleged onset date. Tr. 34,
20 41. The ALJ then found that plaintiff had severe impairments of
21 personality disorder, somatoform disorder, depression, and a
22 learning disorder focused primarily in math. Tr. 35, 41. While
23 finding the impairments to be severe, the ALJ concluded they did
24 not meet or equal any listed impairments. Id.

25 The ALJ then determined that plaintiff retained the residual
26 functional capacity (RFC) of no exertional limitations, no close
27 interaction with the general public, and a limit in extensive math
28 or reading requirements. Tr. 39, 41.

1 In reaching this RFC determination, the ALJ rejected
2 plaintiff's subjective limitations testimony. She found that
3 plaintiff had no difficulties in her activities of daily living or
4 in maintaining social functioning, that she had mild difficulties
5 in maintaining concentration, persistence, or pace, and that she
6 had no episodes of decompensation. Tr. 36. The ALJ rejected the
7 opinion of nurse practitioner Young that plaintiff was unable to
8 work because of pain and fatigue. Tr. 37-38. The ALJ noted that
9 Young's statement of disability was not a statement as to a medical
10 issue regarding the nature and severity of an individual's
11 impairment, and was not the proper subject for a medical source as
12 the final responsibility for deciding the issue of disability is
13 reserved to the Commissioner. Tr. 38 (citing 20 C.F.R. §
14 416.927(e), Soc. Sec. Reg. 96-5P).

15 The ALJ also noted that as a nurse practitioner, Young is not
16 an acceptable medical source under 20 C.F.R. § 216.913. Tr. 38.
17 The ALJ further commented that Young's opinion was based on the
18 unreliable testimony of plaintiff and her mother. Id. Finally,
19 the ALJ noted that Young's conclusion was not supported by the
20 medical records which show no deteriorating condition. Id.

21 The ALJ also rejected Dr. McQueen's August 2003 opinions that
22 plaintiff had severe limitations and would find it difficult or
23 impossible to work full-time. Tr. 38. The ALJ noted that Dr.
24 McQueen had not seen plaintiff in more than one year at the time
25 she rendered this opinion. Id. The ALJ further noted that Dr.
26 McQueen's opinion was based on reports of fibromyalgia or chronic
27 fatigue, as well as reports of problems with concentration which
28 were not supported by objective testing done by Dr. McQueen or Dr.

1 Smolen. Id.

2 The ALJ found plaintiff's mother not credible and commented
3 that plaintiff and her mother focused on obtaining disability
4 benefits for plaintiff, with more than one physician noting her
5 desire to receive disability. Tr. 27, 39. The ALJ also found
6 plaintiff to be not forthcoming in reporting, citing one example in
7 which plaintiff reported having been diagnosed with attention
8 deficit disorder after it had been specifically ruled out by
9 testing some months before. Tr. 39.

10 The ALJ concluded that plaintiff had no past relevant work
11 experience. Tr. 40, 41. Based on the RFC, and relying on the VE
12 testimony, the ALJ concluded that plaintiff retained the ability to
13 perform the jobs of animal shelter worker/helper, soft goods
14 sorter, distributor of printed products, or as an optical goods
15 worker. Tr. 40-41. Accordingly, she concluded that plaintiff was
16 not disabled.

17 II. Child Claim

18 As with the adult claim, the ALJ's decision in the child claim
19 starts with a finding that plaintiff has not engaged in any
20 substantial gainful activity since the alleged onset of her
21 disability, through the age of eighteen. Tr. 21, 29. Next, the
22 ALJ determined that plaintiff has severe impairments of personality
23 disorder, somatoform disorder, depression, and a learning disorder,
24 primarily in math. Tr. 22, 29. While finding these to be severe
25 impairments, the ALJ concluded that they do not meet, medically
26 equal, or functionally equal the criteria of any of the listed
27 impairments in Appendix 1, Subpart P, Regulations No. 4, 20 C.F.R.
28 § 416.924(d). Tr. 22, 29. The ALJ then concluded that plaintiff

1 did not have a combination of medically determinable physical or
2 mental impairments that resulted in marked and severe functional
3 limitations. Tr. 28, 29. Accordingly, she concluded that
4 plaintiff was not disabled.

5 STANDARD OF REVIEW & SEQUENTIAL EVALUATION

6 I. Adult Claim

7 A claimant is disabled if unable to "engage in any substantial
8 gainful activity by reason of any medically determinable physical
9 or mental impairment which . . . has lasted or can be expected to
10 last for a continuous period of not less than 12 months[.]" 42
11 U.S.C. § 423(d)(1)(A).

12 Disability claims are evaluated according to a five-step
13 procedure. Baxter v. Sullivan, 923 F.2d 1391, 1395 (9th Cir.
14 1991). The claimant bears the burden of proving disability.
15 Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989). First, the
16 Commissioner determines whether a claimant is engaged in
17 "substantial gainful activity." If so, the claimant is not
18 disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§
19 404.1520(b), 416.920(b). In step two, the Commissioner determines
20 whether the claimant has a "medically severe impairment or
21 combination of impairments." Yuckert, 482 U.S. at 140-41; see 20
22 C.F.R. §§ 404.1520(c), 416.920(c). If not, the claimant is not
23 disabled.

24 In step three, the Commissioner determines whether the
25 impairment meets or equals "one of a number of listed impairments
26 that the [Commissioner] acknowledges are so severe as to preclude
27 substantial gainful activity." Yuckert, 482 U.S. at 141; see 20
28 C.F.R. §§ 404.1520(d), 416.920(d). If so, the claimant is

1 conclusively presumed disabled; if not, the Commissioner proceeds
2 to step four. Yuckert, 482 U.S. at 141.

3 In step four the Commissioner determines whether the claimant
4 can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e),
5 416.920(e). If the claimant can, he is not disabled. If he cannot
6 perform past relevant work, the burden shifts to the Commissioner.
7 In step five, the Commissioner must establish that the claimant can
8 perform other work. Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§
9 404.1520(e) & (f), 416.920(e) & (f). If the Commissioner meets its
10 burden and proves that the claimant is able to perform other work
11 which exists in the national economy, he is not disabled. 20
12 C.F.R. §§ 404.1566, 416.966.

13 The court may set aside the Commissioner's denial of benefits
14 only when the Commissioner's findings are based on legal error or
15 are not supported by substantial evidence in the record as a whole.
16 Baxter, 923 F.2d at 1394. Substantial evidence means "more than a
17 mere scintilla" but "less than a preponderance." Id. It means
18 such relevant evidence as a reasonable mind might accept as
19 adequate to support a conclusion. Id.

20 II. Child's Claim

21 An individual under the age of eighteen is eligible for
22 childhood SSI payments based on disability if he or she suffers
23 from "a medically determinable physical or mental impairment, which
24 results in marked and severe functional limitations, and which can
25 be expected to result in death or which has lasted or can be
26 expected to last for a continuous period of not less than 12
27 months." 42 U.S.C. § 1382c(a)(3)(C)(I).

28 The Commissioner uses a three-step sequential evaluation

1 process to determine if a claimant is eligible for childhood SSI.
2 20 C.F.R. § 416.924. Step one requires the Commissioner to
3 determine if the claimant is engaged in substantial gainful
4 activity. 20 C.F.R. § 416.924. If so, there can be no finding of
5 disability. If not, the analysis proceeds to step two.

6 Step two requires the Commissioner to decide whether the
7 claimant has a severe impairment. An impairment is severe if it is
8 more than a "slight abnormality or a combination of slight
9 abnormalities" and causes more than "minimal functional
10 limitations." 20 C.F.R. § 416.924(c). If the child has no severe
11 impairment, there can be no finding of disability. If there is a
12 finding of severe impairment, the analysis proceeds to step three.

13 Step three requires the Commissioner to determine whether the
14 impairment "meets or medically equals in severity the set of
15 criteria for an impairment listed in the Listing of Impairments in
16 appendix 1 of subpart P of part 404 of this chapter, or if it is
17 functionally equal in severity to a listed impairment." 20 C.F.R.
18 § 416.924(d); Merrill ex rel. Merrill v. Apfel, 224 F.3d 1083, 1085
19 (9th Cir. 2000). If this equivalency test is met and the statutory
20 duration requirement is satisfied, the child will be found
21 disabled. 20 C.F.R. § 416.924(d)(1).

22 The court may set aside a denial of childhood SSI only if the
23 Commissioner applied the incorrect legal standards or if his or her
24 decision was not supported by substantial evidence in the record.
25 42 U.S.C. § 405(g); Merrill, 224 F.3d at 1084-85.

26 DISCUSSION

27 Plaintiff contends that the ALJ erred in the following ways:
28 (1) in finding that plaintiff does not have EBV or CFS; (2) in

1 finding, in regard to the child application, that plaintiff did not
2 have "marked and severe functional limitations" resulting from the
3 combination of her physical and mental impairments before age
4 eighteen; (3) in rejecting the opinion of treating psychologist Dr.
5 McQueen; (4) in rejecting the opinion of treating nurse
6 practitioner Young; (5) in rejecting plaintiff's testimony; and (6)
7 by failing to meet her burden of proving that plaintiff retains the
8 ability to perform "other work" in the national economy. I address
9 plaintiff's arguments in turn.

10 I. Epstein-Barr Virus and Chronic Fatigue Syndrome

11 As noted above, the ALJ determined, in both the child and
12 adult claims, that plaintiff has severe impairments of personality
13 disorder, somatoform disorder, depression, and a learning disorder.
14 The ALJ found that neither EBV nor CFS were severe impairments.

15 In support of her conclusion regarding EBV, the ALJ explained
16 that active EBV was not supported in the record. Tr. 35. She
17 noted that Dr. Wirth specifically tested for the EBV viral capsid
18 antigen (EBV-VCA) in February or March 2001, but did not diagnose
19 plaintiff with an active EBV infection. Tr. 311 (noting EBV-VCA
20 test results and omitting EBV from assessment/diagnoses section of
21 chart note); see also Tr. 316-17 (laboratory results of EBV test);
22 523 (Dr. Wirth's February 26, 2001 note that her EBV virus IgG was
23 strongly positive, suggesting past exposure/immunity to EBV).

24 The ALJ also noted that other physicians allowed the diagnosis
25 by history or as reported by plaintiff's mother, but attributed no
26 functional limitations to it. Tr. 35. In support of this
27 conclusion, the ALJ cites to chart notes from plaintiff's treatment
28 with Dr. William G. Barish, M.D., in Lebanon, Oregon, from May 27,

1 1999, to December 29, 2000. Tr. 248-61. The ALJ cites to a page
2 in which Physician's Assistant Ben Johnson, working in Dr. Barish's
3 office, reports that plaintiff suffers from cytomegalovirus,
4 "chronically, I guess, according to her Mom." Tr. 254 (chart note
5 from May 27, 1999). Another page from this exhibit suggests that
6 plaintiff's mother indicated that plaintiff had been previously
7 diagnosed by physicians in Pennsylvania with EBV. Tr. 250 (chart
8 note from December 19, 2000). Dr. Barish's office apparently did
9 no independent testing to verify the history as reported by
10 plaintiff's mother.

11 As the ALJ stated, the presence of the antibody as revealed by
12 the testing performed by Dr. Wirth represents only a past
13 infection, not a current one. According to the National Center for
14 Infectious Diseases, run by the United States Centers for Disease
15 Control, EBV is one of the most common human viruses.
16 www.cdc.gov/ncidod/diseases/ebv.htm. Most people become infected
17 with EBV sometime during their lives. Id. When infection with EBV
18 occurs during adolescence or young adulthood, it causes infectious
19 mononucleosis thirty-five to fifty percent of the time. Id.

20 While the symptoms of infectious mononucleosis usually resolve
21 in one or two months, EBV remains dormant or latent in a few cells
22 in the throat and blood for the rest of the person's life. Id.
23 Periodically, the virus can reactivate and is commonly found in the
24 saliva of infected persons. Id. This reactivation usually occurs
25 without symptoms of illness. Id.

26 Symptoms related to infectious mononucleosis caused by EBV
27 infection seldom last for more than four months. Id. When such an
28 illness lasts more than six months, it is frequently called chronic

1 EBV infection, however, "valid laboratory evidence for continued
2 active EBV infection is seldom found in these patients." Id. In
3 such cases, the illness should be further investigated to determine
4 if it meets the criteria for CFS. Id.

5 Plaintiff's February 2001 EBV test results show a positive
6 result on the EBV-VCA IgG. Tr. 316-17. A positive IgG to the VCA
7 "appears in the acute phase, peaks at 2-4 weeks after onset,
8 declines slightly, and then persists for life."
9 www.cdc.gov/ncidod/diseases/ebv.htm. Thus, as the ALJ concluded,
10 plaintiff's EBV test does not substantiate an active EBV. See also
11 Tr. 372 (February 2000 review of EBV laboratory tests to date are
12 consistent with "remote EBV infection [and] are not suggestive
13 [sic] of an active process at this time.").

14 Plaintiff notes that after reviewing her records at the
15 agency's request, Dr. Morell diagnosed plaintiff with EBV syndrome,
16 noting that she had residual upper cervical chain lymphadenopathy
17 that was mildly tender. Pltf's Mem. at p. 19; Tr. 283. What
18 plaintiff fails to note, however, is that Dr. Morell went on to
19 state that despite the swollen cervical lymph glands, plaintiff
20 appeared well and he expected a complete recovery from the EBV
21 infection. Id. Thus, plaintiff's citation to Dr. Morrell's
22 conclusion does not undermine the ALJ's conclusion that plaintiff
23 did not suffer from an active EBV or that there were no functional
24 limitations associated with it.

25 Plaintiff also points to a January 24, 2002 chart note by Dr.
26 Willett, assessing plaintiff with EBV. Pltf's Mem. at p. 19; Tr.
27 309. While Dr. Willett does include EBV in her assessment, this is
28 another example of a diagnosis by history reported by plaintiff's

1 mother. Dr. Willett states that plaintiff "states she has chronic
2 fatigue syndrome, and her and her mother believe it is from the
3 Epstein-Barr virus." Tr. 308. Dr. Willett herself performed no
4 new testing to confirm the presence of any active EBV. In fact,
5 she refers to Dr. Wirth's February 2001 test showing only past
6 exposure and no active virus.

7 Accordingly, the ALJ's rejection of active EBV is supported by
8 substantial evidence in the record and the ALJ did not err in
9 rejecting EBV as a severe impairment.

10 As to the CFS, the ALJ stated that the CFS diagnosis "cannot
11 be traced to a medical source prior to the claimant or her mother
12 providing it to the doctor as an already accepted medical
13 diagnosis." Tr. 22, 35. As an example, the ALJ cites to Dr.
14 Barish's July 24, 2000 chart note in which he states that plaintiff
15 reported having been diagnosed with chronic fatigue by an
16 infectious disease specialist in Eugene. Tr. 253. However, the
17 record does not show assessment or treatment by an infectious
18 disease specialist in Eugene.

19 In February 2000, plaintiff was assessed by an infectious
20 disease specialist in Pennsylvania. Tr. 368-73. At that time, Dr.
21 Green discussed that plaintiff did not meet all of the diagnostic
22 criteria established by the Centers for Disease Control for CFS.
23 Tr. 372. Rather, he suggested that before any diagnosis of CFS
24 could be confirmed, plaintiff should receive a psychiatric
25 evaluation. Tr. 373. He opined that there could be psychological
26 explanations for her fatigue. Id. Interestingly, he also noted
27 that plaintiff's mother told him that an Oregon infectious disease
28 specialist "clearly stated that Sara had chronic fatigue syndrome."

1 Id. Again, I find no such records to substantiate this claim.

2 Prior to the February 2000 evaluation by Dr. Green,
3 plaintiff's Oregon medical practitioners include "PP" at McKenzie
4 Family Practice, Tr. 476³, Dr. Belozher at Samaritan Health
5 Physicians in Lebanon, Oregon, from February 12, 1999, to April 6,
6 1999, Tr. 337-43, and Dr. Goulston, at PeaceHealth Medical Group in
7 Eugene, Oregon, from April 9, 1999, to May 21, 1999. Tr. 344-49.
8 None of these practitioners appear to be infectious disease
9 specialists. Moreover, although Dr. Belozher questioned whether
10 plaintiff had CFS, Tr. 341, she suspected that plaintiff's fatigue
11 was secondary to depression and personality disorder. Tr. 338.
12 She also later noted that plaintiff's "issues" included
13 "questionable chronic fatigue syndrome." Tr. 337. She again
14 expressed a concern regarding underlying depression and a
15 personality disorder. Id. She ultimately suggested that it would
16 be more appropriate for plaintiff and her mother to seek health
17 care at another facility after plaintiff's mother hung up the phone
18 on Dr. Belozher when Dr. Belozher expressed her opinion that
19 plaintiff could indeed go to school. Id.

20 Dr. Goulston noted only that plaintiff, based on her own
21 report, had a "history of chronic fatigue type syndrome." Tr. 344.
22 Dr. Goulston noted that plaintiff had some positive tender points
23

24 ³ This medical record contains no self-identifying
25 information and the practitioner is identified only with the
26 initials "PP." The Administrative Record's index identifies this
27 as a medical record from McKenzie Family Practice. Tr. 6. The
28 first chart entry, dated October 10, 1996, refers to plaintiff
having just moved "here" with her mother, suggesting that this
record belongs to an Oregon medical practice. Tr. 476. There is
no indication of any CFS diagnosis. Id.

1 on her chest wall, but had some false positives in the
2 supraclavicular areas and was not tender over her arms. Id. In
3 her assessment, she opined that plaintiff may have multiple reasons
4 for her fatigue and that depression may be playing a role. Id.

5 In sum, the record supports the ALJ's conclusion that the
6 source for plaintiff's CFS diagnosis is not documented in the
7 record other than by report by plaintiff or her mother.
8 Additionally, as the ALJ further noted, the record shows that
9 plaintiff responded well to some treatments. E.g., Tr. 311 (Dr.
10 Wirth's April 19, 2001 chart note commenting that plaintiff's
11 chronic fatigue had responded well to the category of anti-
12 depressants known as selective serotonin reuptake inhibitors).

13 The Ninth Circuit has held that "an impairment or combination
14 of impairments can be found 'not severe' only if the evidence
15 establishes a slight abnormality that has no more than a minimal
16 effect on an individual's ability to work." Harman v. Apfel, 211
17 F.3d 1172, 1180 (9th Cir. 2000). Plaintiff bears the burden of
18 establishing the existence of a severe impairment, as well as that
19 any severe impairment has prevented plaintiff from engaging in
20 substantial gainful activity for a period of at least twelve
21 continuous months (adult), or has caused marked and severe
22 functional limitations for a continuous period of not less than
23 twelve months (child). 20 C.F.R. §§ 416.905, 416.906. For the
24 reasons explained above, plaintiff has failed to establish that she
25 has severe impairments of EBV or CFS.

26 II. Treating Psychologist Dr. McQueen

27 As noted above in the recitation of medical evidence,
28 plaintiff's treating psychologist from October 23, 2001, to

1 approximately November 27, 2001, was Lila McQueen, Ph.D. Tr. 284-
2 99, 386-95, 429-30. Plaintiff contends that the ALJ erred when the
3 ALJ rejected Dr. McQueen's opinions that (1) plaintiff's physical
4 and mental disorders make it difficult for her to concentrate, get
5 and stay organized, remember details, including appointments and
6 deadlines, and impair her ability to make decisions; (2)
7 plaintiff's disorders caused distress in social and occupational
8 functioning; and (3) that full-time work would be difficult or
9 impossible and that even part-time might be untenable.

10 Where the treating doctor's opinion is not contradicted by
11 another doctor, it may be rejected only for "clear and convincing"
12 reasons. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996). Even
13 if the treating doctor's opinion is contradicted by another doctor,
14 the Commissioner may not reject this opinion without providing
15 "specific and legitimate reasons" supported by substantial evidence
16 in the record. Id.

17 The ALJ rejected Dr. McQueen's opinions regarding plaintiff's
18 concentration and organizational abilities, as well as her ability
19 to remember details and make decisions, because those opinions were
20 not supported by Dr. McQueen's own objective testing. Tr. 27, 38.
21 As the record shows, in the November 29, 2001 Attention Deficit
22 Disorder Assessment Report prepared by Dr. McQueen, plaintiff is
23 rated as having no problems in getting or staying organized, and as
24 having "little" problem with being easily distracted and
25 remembering appointments, promises to do things, or items required
26 for school or a task. Tr. 287-88. These findings undermine the
27 validity of Dr. McQueen's contrary opinions regarding plaintiff's
28 abilities and social functioning as expressed in her

1 contemporaneously-executed letters to Linn-Benton Community College
2 and Disability Determination Services. Tr. 285, 293; see also Tr.
3 330 (Dr. Smolen's May 2002 note that plaintiff adequately performed
4 concentration questions on mental status examination).

5 Next, the ALJ rejected Dr. McQueen's August 2003 opinion
6 regarding plaintiff's functioning and ability to work full- or
7 part-time because at the time Dr. McQueen rendered that assessment,
8 she had not seen plaintiff in over one year and her last contact
9 with plaintiff had been on July 30, 2002, where plaintiff's mother
10 brought her to see Dr. McQueen, but plaintiff refused to be seen.
11 Tr. 386-87. The record establishes that the treating relationship
12 lasted for about four weeks, from the end of October 2001 to the
13 end of November 2001. Tr. 284-99, 386-95, 429-30. Thus, by the
14 time Dr. McQueen rendered her August 2003 opinion, it had been
15 close to two years since she had had an actual treating
16 relationship with plaintiff.

17 Moreover, as the ALJ noted, Dr. McQueen's assessment of
18 functioning was based on a November 2001 evaluation, which in turn
19 relied on unsubstantiated reports of CFS and fibromyalgia. Tr. 38;
20 430. Finally, the ALJ remarked that the determination of
21 disability is reserved to the Commissioner and is not the province
22 of a medical professional.

23 The ALJ has provided clear and convincing reasons, supported
24 in the record, for rejecting Dr. McQueen's opinions. Dr. McQueen's
25 opinions are not supported by the objective medical testing in the
26 record. As to the August 2003 opinion regarding plaintiff's
27 ability to work, it was made so far in time from the actual
28 treating relationship that the opinion is not considered reliable

1 and based on then-current circumstances. And, as the ALJ noted, an
2 ALJ is not bound by the opinions of a treating medical practitioner
3 on the ultimate issue of disability. Reddick v. Chater, 157 F.3d
4 715, 725 (9th Cir. 1998).

5 III. Treating Nurse Practitioner Sandra Young

6 Young treated plaintiff from February 27, 2002, until June 24,
7 2003. Tr. 375-85, 401-12. Plaintiff contends that the ALJ erred
8 in rejecting Young's opinion that plaintiff was unable to work
9 because of pain and fatigue.

10 Although Young was a treating nurse practitioner, a nurse
11 practitioner is not an "acceptable medical source." 20 C.F.R. §
12 404.1513(a)(3). Rather, such professionals are "other sources" as
13 described in the regulations. 20 C.F.R. § 404.1513(d). Under
14 Ninth Circuit precedent, an ALJ must either consider the testimony
15 of such a lay witness or provide germane reasons for not crediting
16 the testimony. Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001);
17 see also Dodrill v. Shalala, 12 F.3d 915, 918-19 (9th Cir. 1993)
18 (to discount the testimony of a lay witness, the ALJ must give
19 reasons that are "germane to each witness.").

20 In April 2003, Young opined that plaintiff was unable "to hold
21 down any sort of employment related to pain and severe fatigue."
22 Tr. 375. The ALJ rejected Young's opinion because Young was not an
23 acceptable medical source, Young's information regarding the
24 assistance plaintiff required was from plaintiff or other third-
25 party sources who were not credible, the treatment records
26 preceding this opinion show that plaintiff's long-term conditions
27 were stable rather than deteriorating as Young expressed, and Young
28 incorrectly accepted diagnoses of fibromyalgia or CFS. Tr. 38.

1 The ALJ found that the subjective testimony on which Young
2 relied was from plaintiff and third party reports, whom the ALJ
3 determined were unreliable sources. Tr. 38. Plaintiff's
4 credibility is separately discussed below. As explained there, the
5 ALJ's rejection of plaintiff's subjective testimony is supported by
6 substantial evidence in the record.

7 The ALJ found that plaintiff's mother was not credible. Tr.
8 27, 39. The ALJ noted chart notes from Dr. Ladd which stated that
9 plaintiff and her mother wanted plaintiff labeled as having a
10 disability. Tr. 39, 324. The ALJ further noted plaintiff's
11 mother's "red ink notations" to medical exhibits which contradicted
12 statements recorded by practitioners as having been made by
13 plaintiff. Tr. 22 n.1, Tr. 35 n.1; Tr. 27, Tr. 369, Tr. 370. The
14 problem, as the ALJ explained, is that plaintiff's mother was not
15 present and could not have known what her daughter had said to the
16 practitioner. Id.

17 Additionally, the ALJ cited several places in the record
18 demonstrating a "systematic attempt to use medical claims for
19 secondary gain and from school activity, to getting special
20 treatment in school, to getting diagnoses to support disability
21 claims." Id. (citing Tr. 337 (chart note from Dr. Belozer
22 describing conversation with plaintiff's mother in which
23 plaintiff's mother requested home schooling and Dr. Belozer not
24 concurring with request); Tr. 339-43 (Dr. Belozer chart notes
25 suggesting continued problems with getting plaintiff to go to
26 school); Tr. 293 (November 2001 letter from Dr. McQueen to Linn-
27 Benton Community College regarding plaintiff's appeal for refund);
28 Tr. 324 (February 2002 chart note from Dr. Ladd remarking that

1 plaintiff and her mother "indicate that they would like to have a
2 definite diagnostic label so they could have her labeled as having
3 a disability"); Tr. 354 (January - February 2000 chart notes from
4 Dr. Thomas regarding request from mother for support for half-day
5 school for plaintiff)); see also Tr. 374 (February 7, 2002 chart
6 note from Dr. Willett stating that "[t]he patient and her mother
7 are looking for a diagnosis of fibromyalgia. . . . The patient and
8 her mother do not seem to be happy with not being diagnosed with
9 fibromyalgia and are asking for s second opinion. . . . The patient
10 is trying for a diagnosis of fibromyalgia like her mother and aunt.
11 They are both on disability.").

12 In support of her determination that plaintiff's mother was
13 not credible, the ALJ also observed that plaintiff's mother tended
14 to advance "suggestions seeking ailments for Sara without
15 reasonable medical cause." Tr. 28. On more than one occasion
16 plaintiff's mother requested medical testing for a problem that was
17 allegedly apparent in other family members, but which was not
18 necessarily apparent in plaintiff. Tr. 28 (citing Tr. 531
19 (requesting evaluation for spine problem and separately requesting
20 neck x-ray); Tr. 374 (Dr. Willett's note that patient and mother
21 looking for diagnosis of fibromyalgia)).

22 Given this record, the ALJ's determination that plaintiff's
23 mother was not credible is supported by substantial evidence in the
24 record, and thus, to the extent Young's opinion was based on
25 information provided by plaintiff's mother, the ALJ had a proper
26 basis for rejecting Young's opinion.

27 Young's treatment records reflect that at her initial
28 appointment, plaintiff complained of fatigue, but was taking a

1 class at the community college and that she ran and exercised
2 daily. Tr. 384. Young later reported that certain medications
3 were working well and although plaintiff appeared "quite fatigued"
4 at one visit, she continued daily exercise, walking, and a home
5 exercise routine. Tr. 383. Later that spring, Young reported that
6 plaintiff was "doing well." Tr. 382. She had moved to Beaverton
7 and was cleaning houses, although she noted that the work wore her
8 out. Id. In August 2002, Young noted that medication was helping
9 the CFS. Tr. 381. In November 2002, Young reported that plaintiff
10 was "doing pretty well" and that her CFS and chronic pain were
11 stable. Tr. 378.

12 The next visit with Young appears to have been March 18, 2003,
13 when plaintiff complained of severe neck pain. Tr. 376. Young
14 noted that plaintiff was "in the midst of a battle with trying to
15 achieve disability" and that she was unable to work. Id. Young
16 saw plaintiff again on April 2, 2003. Tr. 404. Although plaintiff
17 reported no improvement in her symptoms, Young reported that
18 plaintiff was "in mild physical distress." Id.

19 In her April 24, 2003 letter in which she expresses her
20 opinion that plaintiff is unable to hold any sort of employment
21 because of her pain and fatigue, Young states that she has seen
22 plaintiff once or twice per month for the past year. Tr. 375. The
23 record does not support this assertion. Tr. 376-84, 404 (office
24 visits with Young on March 19, 2002, May 7, 2002, August 23, 2002,
25 November 18, 2002, March 18, 2003, and April 2, 2003). She was
26 also seen by other practitioners in the same clinic as Young on
27 February 27, 2002, and January 13, 2003. Tr. 377, 384. While
28 there is no doubt that Young was treating plaintiff, the frequency

1 of her treatment is not as extensive as claimed.

2 Aside from the March 18, 2003 visit to Young for neck pain,
3 Young's chart notes refer to plaintiff "doing well," "doing pretty
4 well," being in "mild physical distress," being "stable," and
5 exercising and working. Given these treatment records, the ALJ did
6 not err in rejecting Young's opinion that plaintiff's condition was
7 deteriorating.

8 Finally, for the reasons previously articulated, the record
9 supports the ALJ's determination that plaintiff's CFS was not a
10 severe impairment and thus, the ALJ properly disregarded Young's
11 reliance on this diagnosis as a basis for her opinion regarding
12 plaintiff's inability to work.

13 IV. Rejection of Plaintiff's Testimony

14 The ALJ determined that plaintiff was not credible. Tr. 27,
15 28, 39. The ALJ found that plaintiff and her parents manipulated
16 her housing in an attempt to circumvent the resource requirements
17 for SSI, that plaintiff made false representations to physicians
18 regarding diagnoses, that she engaged in "doctor shopping," and
19 that she was focused on obtaining disability. Tr. 27, 28.

20 Once a claimant produces objective evidence of an underlying
21 impairment, if there is no affirmative evidence that she is
22 malingering, the ALJ must provide clear and convincing reasons for
23 rejecting her testimony. Moisa v. Barnhart, 367 F.3d 882, 885 (9th
24 Cir. 2004). Defendant concedes that plaintiff presented objective
25 evidence of impairments that could reasonably be expected to
26 produce some level of symptoms. However, defendant argues, and I
27 agree, that the ALJ provided clear and convincing reasons supported
28 by substantial evidence in the record, to find plaintiff's

1 subjective testimony not credible regarding the severity of her
2 symptoms.

3 The ALJ noted that plaintiff's first application for SSI was
4 on April 2, 2001, when she lived with her mother in Oregon. Tr.
5 27. On April 10, 2001, the claim was denied because of plaintiff's
6 mother's excess resources. Id. Plaintiff then moved back to
7 Pennsylvania to be with her father and re-filed her application,
8 with a protective filing date of April 11, 2001. Id. Then, in
9 September, while that application was still pending, she moved back
10 to Oregon to her mother's. Id. One reasonable interpretation of
11 this sequence of events is that plaintiff and her parents
12 manipulated her housing in order to circumvent the resource
13 requirements for SSI. As the ALJ is responsible for determining
14 credibility and resolving ambiguities, Andrews v. Shalala, 53 F.3d
15 1035, 1039 (9th Cir. 1995), and the evidence is capable of
16 supporting the inference the ALJ drew, it was not error for the ALJ
17 to conclude that plaintiff and her parents had engaged in
18 manipulative conduct.

19 The record also supports the ALJ's finding that plaintiff has
20 misrepresented her diagnoses to later-consulted physicians. An
21 example noted by the ALJ is plaintiff's representation to Dr. Ladd
22 that she had been diagnosed as having attention deficit disorder
23 when just a few months earlier, Dr. McQueen, to whom plaintiff had
24 been referred specifically to assess for the condition, had
25 determined that plaintiff did not have the disorder. Tr. 289, 324;
26 see also Tr. 402 (June 24, 2003 chart note from nurse practitioner
27 Young stating that plaintiff reported she "continues treatment with
28 Linn County Mental Health"); Tr. 414-28 (treatment records from

1 Linn County Mental Health showing initial intake and treatment plan
2 developed in April 2003, but no actual treatment or contact after
3 that date).

4 As for "doctor shopping," the record demonstrates that in
5 February 1999, plaintiff began seeing Dr. Belozer in Lebanon,
6 Oregon, to establish care after recently moving from Pennsylvania
7 and living with her father, to living with her mother in Oregon.
8 Tr. 343. She saw Dr. Belozer a few times over the next six weeks
9 until April 6, 1999, when Dr. Belozer disagreed with plaintiff's
10 mother over whether plaintiff could actually attend school. Tr.
11 337. Then, on April 9, 1999, three days after this disagreement
12 with Dr. Belozer, plaintiff began treating with Dr. Goulston in
13 Eugene, representing to Dr. Goulston at that time that she had
14 moved to Oregon just last month and omitting any reference to her
15 relationship with Dr. Belozer. Tr. 347.

16 In another instance, plaintiff saw Dr. Willett at the
17 Corvallis Clinic in February 2002. Tr. 374. Dr. Willett had
18 referred plaintiff to Dr. Ladd for an assessment of fibromyalgia.
19 Tr. 324. Dr. Ladd did not find plaintiff to have the disease. At
20 the February 7, 2002 visit with Dr. Willett after Dr. Ladd's
21 assessment, plaintiff expressed unhappiness with Dr. Ladd's
22 diagnosis. Id. Dr. Willett apparently referred plaintiff to a Dr.
23 Hudson in Eugene for further evaluation, but there are no records
24 from a Dr. Hudson in this administrative record. Plaintiff
25 rejected Dr. Willett's recommendation of the fibromyalgia clinic at
26 Oregon Health & Sciences University because she did not want to go
27 that far. Id.

28 Curiously, instead of continuing treatment with Dr. Willett,

1 or seeking a consultation with Dr. Hudson, plaintiff began treating
2 with Dr. Gallant at Corvallis Internal Medicine just three weeks
3 after her February 7, 2002 visit with Dr. Willett. Tr. 384.
4 Again, plaintiff represented to this new physician that she had
5 recently moved to Oregon and again omitted any reference to her
6 treatment at the Corvallis Clinic with Dr. Willett. Id.

7 Moreover, Dr. Willett's February 7, 2002 chart note, as well
8 as others in the record, suggest this change in physician upon
9 receiving a diagnosis or treatment option with which she disagreed,
10 was motivated by an effort to obtain a diagnosis which would
11 support her disability claim. E.g., Tr. 374 (Dr. Willett's
12 February 7, 2004 chart note stating that "patient and her mother
13 are looking for a diagnosis of fibromyalgia. . . . The patient and
14 her mother do not seem to be happy with not being diagnosed with
15 fibromyalgia and are asking for a second opinion. . . . The patient
16 is trying for a diagnosis of fibromyalgia like her mother and aunt.
17 They are both on disability. They are working with social security
18 to get disability for these diagnoses."); Tr. 324 (February 6, 2002
19 chart note by Dr. Ladd stating that the patient and her mother
20 "would like to have a definite diagnostic label so they could have
21 her labeled as having a disability"); Tr. 280 (chart note of
22 examining physician Dr. David Morrell stating that plaintiff
23 remarked that she planned to move in with a friend "as soon as she
24 receives disability payment"); Tr. 490 (September 1996 chart note
25 from Dr. Albert Turbessi stating that plaintiff's mother "seems to
26 have sought numerous medical opinions to glean a diagnosis of
27 chronic EBV infection").

28 The record supports the ALJ's finding that plaintiff has

1 "engaged in doctor shopping" in an effort to obtain a diagnosis
2 supportive of disability and that this negatively impacts her
3 credibility. The ALJ's credibility determination is based on clear
4 and convincing reasons, supported by substantial evidence in the
5 record.

6 V. Child Application - Marked and Severe Functional Limitations

7 As noted above, a child is disabled for the purposes of SSI if
8 the child suffers from "a medically determinable physical or mental
9 impairment, which results in marked severe functional limitations,
10 and which can be expected to result in death or which has lasted or
11 can be expected to last for a continuous period of not less than 12
12 months." 42 U.S.C. § 1382c(a)(3)(C)(I). An impairment causes
13 "marked and severe functional limitations" if it meets or medically
14 equals the severity of a set of criteria for an impairment in the
15 listings or if it functionally equals the listings. See 20 C.F.R.
16 § 416.924(d).

17 The ALJ found that plaintiff's condition did not meet or equal
18 the criteria of a listed impairment. Tr. 22. As a result, the ALJ
19 next assessed whether any impairments resulted in limitations that
20 functionally equal the listings. 20 C.F.R. § 416.926a(a). Tr. 23-
21 28. After a thorough discussion, she concluded that plaintiff's
22 impairments did not cause limitations functionally equal to the
23 listings. Tr. 28.

24 To meet the standard of the functional equivalent of a non-
25 listing impairment, the impairment must be of "listing-level
26 severity" which means it must resulted in "'marked' limitations in
27 two domains of functioning or an 'extreme' limitation in one
28 domain[.]" 20 C.F.R. § 416.926a(a). The delineated "domains of

1 functioning" are (1) acquiring and using information; (2) attending
2 and completing tasks; (3) interacting and relating with others; (4)
3 moving about and manipulating objects; (4) caring for yourself; and
4 (6) health and physical well-being. 20 C.F.R. § 416.926a(b)(1).

5 Although the ALJ made findings for each "domain of
6 functioning," plaintiff challenges only the findings in the areas
7 of caring for yourself and health and physical well-being. Thus,
8 I do not discuss the ALJ's decision regarding the other domains.

9 In support of her finding that plaintiff did not have a marked
10 or extreme limitation in the ability to care for herself, the ALJ
11 noted that the relevant considerations include how well a child
12 maintains a healthy and emotional physical state, how well a child
13 gets physical and emotional wants and needs met in appropriate
14 ways, how well a child copes with stress and changes in the
15 environment, and how well the child takes care of his or her own
16 health, possessions, and living area. Tr. 26.

17 The ALJ concluded that plaintiff is able to do self-care,
18 demonstrating excellent hygiene and grooming and some ability to
19 maintain her home. Id. The ALJ recognized that plaintiff reported
20 that she needed help and had to take breaks in housework because of
21 fatigue. Id. But, the ALJ concluded, plaintiff was "nonetheless
22 capable of and functions with less than marked limitation in this
23 domain." Id. The ALJ also noted that plaintiff has social contact
24 with friends who "hung out" at her home. Id.

25 In support of her finding that plaintiff did not have a marked
26 or extreme limitation in the domain of health and physical well-
27 being, the ALJ noted the relevant consideration of the cumulative
28 physical effects of physical or mental impairments, along with

1 their associated treatments or therapies upon a child's
2 functioning. Id. Additionally, the ALJ noted that the stability
3 of the child's condition and how a child functions during periods
4 of exacerbation of symptoms were considered in this domain. Id.

5 The ALJ stated that the evidence revealed that plaintiff was
6 primarily limited by alleged fatigue and a refusal to go to school.
7 Id. For example, the ALJ noted, when a treating physician,
8 addressing plaintiff's complaints, wrote a note for her to attend
9 school from 10:30 a.m. to 4:30 p.m., she still only went one time.
10 Id. (citing Tr. 339). And, as the ALJ noted, in 2000, another
11 physician group noted that their efforts to make her attend school
12 full-time had not been successful. Tr. 352.

13 The ALJ further noted that plaintiff's complaints of fatigue
14 were not supported by any valid diagnosis of chronic fatigue or
15 fibromyalgia. Tr. 26. The ALJ also remarked that the record
16 showed extensive doctor shopping when a denial diagnosis or special
17 benefits were not obtained and that throughout the medical record,
18 her medical examinations were within normal limits. Tr. 26-27.
19 Accordingly, the ALJ concluded that plaintiff had less than marked
20 limitations in health and well-being.

21 Plaintiff argues that the ALJ erred by not finding that she
22 has a marked or extreme limitation in the domains of caring for
23 herself and health and well-being. As support for her argument,
24 plaintiff simply contends that she "has established that she is
25 frequently ill with episodes or exacerbations more than three times
26 a year that prevent her from engaging in her normal activities[;]"
27 and that her "physical and mental conditions combine to interfere
28 very seriously with her ability to independently initiate, sustain,

1 or complete activities." Pltf's Mem. at p. 21 (internal quotation
2 omitted). Plaintiff cites no evidence in the record in support of
3 these arguments. Presumably then, plaintiff relies on the evidence
4 she cites in support of her other arguments to support this
5 argument.

6 For the reasons explained in connection with plaintiff's other
7 arguments, however, I reject plaintiff's argument in this regard.
8 In making her assessment, the ALJ cited the correct legal
9 standards. Tr. 24-25. As noted herein, the record supports the
10 ALJ's findings that plaintiff's EBV and CFS are not severe
11 impairments and that plaintiff's subjective testimony is not
12 credible. The record also supports the ALJ's rejection of the
13 opinions of plaintiff's treating psychologist Dr. McQueen and
14 plaintiff's treating nurse practitioner Young.

15 The ALJ correctly noted that plaintiff has excellent hygiene
16 and grooming and some ability to take care of her home. The ALJ's
17 finding regarding plaintiff's doctor shopping is also supported in
18 the record. And, as the ALJ suggested, plaintiff failed to attend
19 school even when her physician specifically tailored her school
20 obligation to plaintiff's subjective limitations. Thus, the ALJ's
21 finding that plaintiff does not have a marked or extreme impairment
22 in the ability to care for herself or in her health and physical
23 well-being, is supported by substantial evidence in the record.

24 VI. Ability to Perform Other Work in the National Economy

25 Finally, plaintiff contends that the ALJ erred in concluding
26 that plaintiff is capable of performing work that exists in
27 significant numbers in the national economy, including jobs such as
28 animal shelter worker/helper, soft goods sorter, printed products

1 distributor, and optical goods worker. Plaintiff argues that the
2 record supports a finding that she can work no more than one to two
3 hours per day and that based on the VE's testimony that such a
4 limitation would preclude all full-time competitive work, the ALJ's
5 conclusion was in error.

6 I reject plaintiff's argument. For all of the reasons
7 previously discussed, the ALJ did not err in rejecting the evidence
8 in support of plaintiff's claim that she cannot work more than one
9 to two hours per day. There is no competent medical evidence to
10 support plaintiff's assertion and the ALJ's reasons for rejecting
11 her subjective testimony in this regard are well-founded. Thus,
12 the VE's testimony that such a limitation would preclude
13 competitive full-time employment is irrelevant.

14 CONCLUSION

15 The Commissioner's decision to deny plaintiff's claims should
16 be affirmed.

17 SCHEDULING ORDER

18 The above Findings and Recommendation will be referred to a
19 United States District Judge for review. Objections, if any, are
20 due September 27, 2005. If no objections are filed, review of the
21 Findings and Recommendation will go under advisement on that date.

22 / / /

23 / / /

24 / / /

25 / / /

26 / / /

27 / / /

28 / / /

1 If objections are filed, a response to the objections is due
2 October 11, 2005, and the review of the Findings and Recommendation
3 will go under advisement on that date.

4 IT IS SO ORDERED.

5 Dated this 12th day of September, 2005.

8 /s/ Dennis James Hubel
9 Dennis James Hubel
 United States Magistrate Judge